

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1979
No. 79-492

ROBERT MICHAEL FUNGAROLI,
Appellant

vs.

JUDITH DIANE FUNGAROLI,
Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NORTH CAROLINA

MOTION TO DISMISS APPEAL

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December 10, 1979

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Appellee moves the Court to dismiss the Appeal herein
on the following grounds:

I. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED
BY THE APPEAL

The gist of the question presented to this Court for
decision by Appellant is whether he was denied procedural due pro-
cess when he was given neither notice nor opportunity to be
heard before being Ordered to pay alimony pendente lite to the
defendant, and that insofar as North Carolina General Statute
§50-16.8 authorizes such a practice, it is unconstitutional as
applied to him. Inasmuch as North Carolina General Statute
§50-16.8, as applied to the facts of this case^{1/} clearly authorized

^{1/} §50-16.8(e) provides that "[n]o order for pendente lite shall
be made unless the supporting spouse shall have had five days
notice thereof; but if the supporting spouse shall have aban-
doned the dependant spouse and left the State, or shall be in
parts unknown, or is about to remove or dispose of his or her
property for the purpose of defeating the claim of dependant
spouse, no notice is necessary". [Emphasis Supplied]. The trial
court thus found that no notice to plaintiff was required inas-
much as "plaintiff had left the State of North Carolina, taking
with him the child of the parties; plaintiff had not supported
defendant in any way since the 21st of December, 1977; plain-
tiff was gainfully employed, being the co-owner of Ridgetop
Records in Winston-Salem; that defendant had no income at all
and no residence". Fungaroli v. Fungaroli, 40 N.C.App. 397,
252 S.E.2d 849, 850 (1979).

the District Judge to enter his Order without notice to the
plaintiff, the sole question for decision by this Court is
whether §50-16.8 is constitutional. Because of the narrow
specificity with which it is drawn and applied, defendant con-
tends that it is constitutional on its face and as applied in
the action below.

While it cannot be denied that the right to be heard
"has little reality or worth unless one is informed that the
matter is pending and can choose for himself whether to appear
or default, acquiesce or contest", Mullane v. Central Hanover
Bank and Trust Co., 399 U.S. 306, 314, 95 L.Ed. 865, 70 S.Ct.
652, it is equally true that summary procedures "may well meet
the requirements of due process in extraordinary situations".
Sniadach v. Family Finance Corp., 395 U.S. 337, 23 L.Ed. 2d 349,
352, 89 S.Ct. 1820. Those extraordinary situations have been
defined by this Court as follows:

"First, in each case, the seizure has been
directly necessary to secure an important
governmental or general public interest.
Second, there has been a special need for
very prompt action. Third, the State has
kept strict control over its monopoly of
legitimate force: the person initiating
the seizure has been a government official
responsible for determining, under the
standards of a narrowly drawn statute
that it was necessary and justified in the
particular instance."

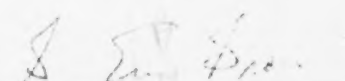
Fuentes v. Sheven, 407, U.S. 67, 91, 32 L.Ed. 2d 556, 92. S. Ct.
1893. It is Appellee's contention that the North Carolina Legis-
lature, in choosing to treat a dependant spouse for whose benefit
an Order for the payment of alimony or alimony pendente lite has
been entered as a creditor, see N.C. General Statutes §50-16.7(e),
(g), (h), and in carefully limiting when the supporting spouse
shall not be entitled to notice to those situations enumerated in
§50-16.8(e), the Legislature has acted in a constitutional fashion,
and has complied with the test set forth above. Cf., Fuentes,
supra, 407 U.S. at 94 ("There may be cases in which a creditor
could make a showing of immediate danger that a debtor will des-
troy or conceal disputed goods. But the statutes before us are

not narrowly drawn to meet any such unusual condition."); Sniadach,
supra, 395 U.S. at 339([I]n the present action no situation re-
quiring special protection to a State or creditor interest is pre-
sented by the facts; nor is the Wisconsin statute narrowly drawn
to meet any such unusual condition"). (Emphasis added.) And see,
Barber v. Barber, 136 N.C. 316, 48 S.E. 733(1904).

CONCLUSION

For the foregoing reasons it is the contention of the
Appellee that the question presented in the jurisdictional
statement of the Appellant does not represent a substantial con-
stitutional question, and that this Court should, therefore,
affirm the Judgment of the Appellate and Trial Courts below and
dismiss the instant appeal.

Respectfully submitted, this the ____ day of December,
1979.




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NORTH CAROLINA)
)
FORSYTH COUNTY)

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the
foregoing Motion to Dismiss on John F. Morrow, Esquire, Attorney
for Appellant, placing said copy in a postpaid envelope addressed
to said attorney at Suite 325, NCNB Plaza, Winston-Salem, North
Carolina, 27101, which is his last known address, and by placing
said envelope and its contents in the United States Mail at
Winston-Salem, North Carolina, on December 10, 1979.



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